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No. 97-1578

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

HOECHST CELANESE CORPORATION,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE OF THE ANTIMICROBIAL TREATED ARTICLE COALITION IN SUPPORT OF PETITIONER

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28 pp

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS 1

QUESTION PRESENTED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 2

A. *Hoechst* Is Not an Isolated Instance of an Illegal Agency Tactic; Federal Administrative Agencies Often Announce Substantive Changes in Regulatory Meaning Through Enforcement Proceedings Without Providing Fair Notice or Opportunity to Come Into Compliance 2

B. EPA's Most Recent Use of This Invalid Practice .. 3

1. The FIFRA Treated Article Exemption 3

2. *Lifetime Hoan* Is the Archetype of Illegal Use of the Enforcement Tool 8

C. EPA's Tactic Illegally Circumvents the APA and Regulatory Review Statutes 12

D. EPA's Illegal Use of the Enforcement Process Continues Today 14

E. Other Federal Agencies Use This Tactic 15

F. By Giving Undue Deference to Agency Enforcement Interpretations, Courts Are Promoting an Illegal Practice 18

CONCLUSION 20

TABLE OF AUTHORITIES

FEDERAL CASES:

Alaska v. Department of Transp., 868 F.2d 441(D.C. Cir. 1989) 16

Bellarno Int'l Ltd. v. FDA, 678 F. Supp. 410 (E.D.N.Y. 1988) 16

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) 19

Central Hudson Gas & Electrical Corp. v. Public Service Comm'n, 447 U.S. 557 (1980) 15

Chamber of Commerce of the United States v. OSHA, 636 F.2d 464 (D.C. Cir. 1980) 16

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 18

CWM Chemical Servs., Inc., No. TSCA-PCS-91-0213 (EPA May 15, 1995) 13

Homemakers North Shore, Inc. v. Bowen, 832 F.2d 408 (7th Cir. 1987) 19

Jerri's Ceramic Arts, Inc., v. Consumer Prod. Safety Comm'n, 874 F.2d 205 (4th Cir. 1989) 16

Martin v. American Cyanamid Co., 5 F.3d 140 (6th Cir. 1993) 18

TABLE OF AUTHORITIES — Continued

Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144 (1991) 16

Prows v. United States Dept. of Justice, 704 F. Supp. 272 (D.D.C. 1988), *aff'd*, 938 F.2d 274 (D.C. Cir. 1991) 16

San Diego Air Sports Ctr., Inc. v. FAA, 887 F.2d 966 (9th Cir. 1989) 15

Secretary of Labor v. American Cyanamid Co., No. 86-681, 1992 WL 30659 at *1 (OSHRC Feb. 7, 1992) 18

Skidmore v. Swift & Co., 323 U.S. 134 (1944) ... 19

Southern Cal. Aerial Advertisers' Ass'n v. FAA, 881 F.2d 672 (9th Cir. 1989) 15

Texaco, Inc. v. Federal Power Comm'n, 412 F.2d 740 (3d. Cir. 1969) 16

Udall v. Tallman, 380 U.S. 1 (1965) 18

United States v. Bioclinical Sys., Inc., 666 F. Supp. 82 (D. Md. 1987) 16

United States v. Picciotto, 875 F.2d 345 (D.C. Cir. 1989) 15

TABLE OF AUTHORITIES -- Continued

FEDERAL STATUTES AND REGULATIONS:

29 C.F.R. § 1910.1200(f)(1) (1997) 17

40 C.F.R. § 152.25(a) (1997) ..... *passim*

Administrative Procedure Act, 5 U.S.C. §§ 551-596 (1994) ..... *passim*

Administrative Procedure Act, 5 U.S.C. § 551(4) (1994) 14

Clean Air Act, 42 U.S.C. §§ 7401-7671q (1994) 3

Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (1994) ..... *passim*

Federal Insecticide, Fungicide, and Rodenticide Act § 13(a), 7 U.S.C. § 136k(a) (1994) 6

Federal Insecticide, Fungicide, and Rodenticide Act § 25(b), 7 U.S.C. § 136w(b) (1994) 4

Federal Insecticide, Fungicide, and Rodenticide Act § 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A) (1994). 10

Paperwork Reduction Act , 44 U.S.C. §§ 3501-3520 (1994) 14

TABLE OF AUTHORITIES — Continued

Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 111 Stat. 2592 14

FEDERAL REGISTER:

63 Fed. Reg. 19,256 (April 17, 1998) 7, 14, 15

OTHER AUTHORITIES:

Charles M. Chadd & Jerome K. Bowman, *Agencies' Enforcement of Ambiguous Regulations Don't Deserve Judicial Deference* (Washington Legal Found., Critical Legal Studies, Working Papers Series No. 84, 1988) ... 19

Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (October 4, 1993) 14

In re Hasbro, Inc., No. FIFRA 97-H-06, Consent Agreement and Consent Order (EPA Apr. 22, 1997) 9

In re Lifetime Hoan Corp., No. FIFRA 98-H-04, Consent Agreement and Consent Order (EPA Feb. 13, 1998) 10, 11

In re Minnesota Mining and Manufacturing Company, No. 5-FIFRA-97-027, Consent Agreement and Consent Order (EPA Sept. 29, 1997) 9

TABLE OF AUTHORITIES — Continued

OSHA Compliance Instruction (CPL), *CPL 2-2.38C, Inspection Procedures for the Hazard Communication Standard, 29 C.F.R. 1910.1200, 1915.99, 1917.28, 1918.90, 1926.59, 1928.21* (Oct. 1990) 17

Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like-- Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311 (1992) 13, 15

U.S. Environmental Protection Agency, Press Release, *EPA Acts to Prevent Playschool Toy Manufacturer Hasbro, Inc., From False Claims About Protecting Children from Microbial Infections* (Apr. 18, 1997) 12

The Antimicrobial Treated Article Coalition (Coalition) respectfully submits this brief *amicus curiae* in support of petitioner.[1/] The written consents of all parties have been filed with the Clerk of the Court, pursuant to Rule 37.2.(a).

INTEREST OF AMICUS CURIAE

The Coalition is an unincorporated consortium of ten companies that (1) produce finished goods containing preservatives registered as pesticides by the U.S. Environmental Protection Agency (EPA) under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (1994); or (2) produce the pesticides used as preservatives in such finished goods. As described below, a new Agency interpretation of an exemption applicable to antimicrobial treated articles announced through a series of enforcement actions has put members of the Coalition at risk of stop sale orders and civil penalties despite their best efforts to obtain guidance from the Agency and to conform their behavior to the requirements of the exemption.

The tactic of using enforcement actions to change the scope of a published legislative rule is being used by EPA and other federal administrative agencies with increasing frequency and audacity. It is not an issue unique to reducing air emissions of a hazardous substance such as benzene, as in *Hoechst*.[2/] The

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1/ Pursuant to Rule 37.6, Amicus represents that this brief was not authored in whole or in part by counsel for any party, and that no entity other than Amicus, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

2/ *Hoechst Celanese Corp. v. United States*, 964 F. Supp. 967 (D.S.C. 1996), *aff'd in part, rev'd in part*, 128 F.3d 216 (4th Cir. 1997), *petition for cert. filed*, (U.S. Mar. 23, 1998) (No. 97-1578).

situations described in this brief demonstrate that the enforcement practices of various federal agencies require judicial oversight and that the applicable standard of deference to agency interpretations in some circumstances should be reexamined.

QUESTION PRESENTED

The issue presented is whether and to what degree federal administrative agencies can properly adopt and enforce regulatory interpretations that are materially inconsistent with those announced when a rule is first promulgated, without formal amendment of the original rule.

STATEMENT OF THE CASE

Amicus adopts the statement of the case provided in petitioner's petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

A. *Hoechst* Is Not an Isolated Instance of an Illegal Agency Tactic; Federal Administrative Agencies Often Announce Substantive Changes in Regulatory Meaning Through Enforcement Proceedings Without Providing Fair Notice or Opportunity to Come Into Compliance

Hoechst is only one example of a pervasive, illegal practice used by federal administrative agencies to avoid the strictures of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-596 (1994) and other statutory authority in developing legislative rules governing citizen behavior. As the scope of regulated behaviors has grown, federal administrative agencies have struggled to develop appropriate rules. Rather than formally amending rules to address new developments or policy decisions, however, administrative agencies are increasingly "reinterpreting" the meaning of existing regulations, often for the first time in an enforcement proceeding, in ways that impose new substantive obligations on regulated entities. An integral part of this practice of reinterpretation is the assertion that the agency's posture represents nothing more than implementation of long-standing agency policy.

When used in the manner described in *Hoechst*, this approach illegally circumvents established APA public participation and regulatory review procedures to the detriment of the regulated community.

B. EPA's Most Recent Use of This Invalid Practice

1. The FIFRA Treated Article Exemption

Pesticides distributed or sold in the United States are regulated primarily under FIFRA. Like the Clean Air Act, 42 U.S.C. §§ 7401-7671q (1994), a regulatory provision of which is at issue in *Hoechst*, FIFRA is administered by EPA. Central to FIFRA's statutory scheme is the concept of a pesticide registration (required under section 3 of FIFRA), which essentially is a license granted to a named registrant to sell or distribute a specific product for specified uses.

Under section 25(b) of FIFRA, EPA can by regulation exempt from FIFRA pesticides that the Agency determines are either adequately regulated by another federal agency or are of a character not requiring regulation under FIFRA.[3/] Mixtures and articles treated with registered pesticides to protect the formulation or article itself currently are covered by such an exemption at 40 C.F.R. § 152.25(a), which was promulgated in 1988.[4/] This provision, known as the "treated article" exemption, reads as follows:

> The pesticides or classes of pesticides listed in this section have been determined to be of a character not requiring regulation under FIFRA, and are therefore exempt from all provisions of FIFRA when intended for use, and used, only in the manner specified.
>
> (a) *Treated articles or substances.* An article or substance treated with, or containing, a pesticide to protect the article or substance itself (for example, paint treated with a pesticide to protect the paint coating, or wood products treated to protect the wood against insect or fungus infestation), if the pesticide is registered for such use.

3/ FIFRA § 25(b), 7 U.S.C. § 136w(b) (1994).

4/ The predecessor to 40 C.F.R. § 152.25(a) was promulgated in 1975 and was codified at 40 C.F.R. § 162.4(c) (1975). 40 Fed. Reg. 28,242 (July 3, 1975).

40 C.F.R. § 152.25(a) (1997).[2/]

Critical to the issue the Coalition wishes to highlight is the recognition that *neither the exemption, its preamble, nor any publicly distributed guidance since the promulgation of the exemption in 1988 place any restrictions on label statements describing the presence of an antibacterial or any other pesticide incorporated into a formulation or article, or on the claims related to the benefits of protecting the article itself.* The exemption simply states that an article or substance treated with or containing a pesticide to protect the article or substance itself is exempt from all requirements of FIFRA if the pesticide is registered for such use.

Until recently, the treated article exemption was an obscure and noncontroversial regulatory provision. In recent years, however, consumer concern regarding hygienic practices and safety has produced significant demand for products that contain antimicrobial protection, resulting in an abundance of these products in the U.S. marketplace. According to EPA, these products include toothbrushes, juvenile toys and related items, kitchen accessories (*e.g.*, cutting boards), sponges, mops, shower curtains, cat litter, vacuum cleaner bags, pillows, mattresses, wrist bands, and tablecloths. For the most part, these products were developed and marketed under the good faith belief that they were in full compliance with FIFRA and the treated article exemption. EPA has been aware of these specific uses for a decade or more, and on several occasions has specifically acknowledged the appropriateness of promotional statements regarding aesthetic benefits that result, for example, when paints and shower curtains are treated to resist mildew, and when cat litter is treated to reduce odors. However, as shown by the following chronology, EPA evolved a new

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2/ Section 25(b) of FIFRA provides clear authority for EPA to reach this conclusion.

interpretation of the treated article exemption over the last year and a half as the Agency brought enforcement actions against various manufacturers.

May 16, 1988. EPA promulgates the current version of the treated article exemption.

Early 1997. In public stakeholders meetings, in response to questions EPA acknowledges that it has some concerns about treated articles, and promises to issue guidance outlining the Agency's concerns and the limits of the exemption, and to provide manufacturers with time to comply.

March 1997. Without publishing its promised clarifications, EPA issues Stop Sale, Use, or Removal Orders (SSURO)[6/] against several manufacturers and distributors of treated articles, including some who consulted with EPA's Office of Pesticide Program (OPP) staff prior to marketing their products.

May 1997. EPA releases for comment a draft of a proposal to, *inter alia*, amend section 152.25(a). The draft would modify and expand the treated article exemption to address newly identified concerns, and explicitly recognizes that modification of the published rule is needed. This draft is subsequently abandoned by EPA in favor of adopting a new interpretation of the existing rule.

June-July 1997. EPA issues press releases announcing settlements in several enforcement cases and releases language negotiated in the consent orders for labels of affected products.

September-October 1997. Additional settlements are reached, with different language accepted for the revised labels.

6/ FIFRA § 13(a), 7 U.S.C. § 136k(a) (1996). A SSURO has the immediate effect of impounding all products subject to the order, wherever located, and prohibits sale or distribution until the order is lifted. It is an enforcement tool that is coercive *in extremis*.

November-December 1997. EPA inspectors visit at least one manufacturer, Lifetime Hoan Corporation, to investigate a possible violation of FIFRA due to the sale of unregistered cutting boards with antimicrobial claims. No problems are noted.

January 14, 1998. EPA issues SSURO's to seven companies, including Lifetime Hoan, that are participating in the International Housewares Show at Chicago's McCormick Place. The SSURO's allege that the companies are marketing unregistered pesticides.

February-April 1998. Extended negotiations over label language by Lifetime results in yet different statements for new labels compared with that required for re-labeling existing stock, and different from labels authorized by earlier settlements.

April 17, 1998. EPA publishes a *Federal Register* notice in which it memorializes a new interpretation of the exemption that it had developed through enforcement actions during 1997.[7/] The notice also officially announces the availability of a draft Pesticide Registration (PR) notice intended to "clarify" EPA's interpretation of the exemption.[8/] The *Federal Register* notice reveals the full extent of the substantive modification of the treated article exemption that

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7/ 63 Fed. Reg. 19,256 (Apr. 17, 1998).

8/ PR notices are policy statements made available by EPA to pesticide manufacturers, formulators, producers, and registrants, and are intended to clarify specific aspects of FIFRA and its implementing regulations and to set forth Agency policy. PR notices are made available to the public for comment. However, other than a notice announcing their availability, PR notices are not published in the *Federal Register* nor are they subject to a formal proceeding. Under the PR notice rubric, the agency is freed from the burden of disclosing the basis for its decision, and review is not possible unless and until an enforcement action is initiated.

had occurred during 1997 and itself notes that the PR notice contains "new elements" of the exemption.[9/]

2. *Lifetime Hoan* Is the Archetype of Illegal Use of the Enforcement Tool

EPA's enforcement action against Lifetime Hoan shows that the process of reinterpretation continues and that the offending method used in *Hoechst* is widespread. Indeed, because a FIFRA stop sale order causes an immediate marketing interruption (in addition to the monetary penalties that usually accompany settlement), Lifetime's case is in some respects more troubling than *Hoechst*.

In 1997, Lifetime Hoan began developing a line of houseware products containing an antimicrobial ingredient. Lifetime was well aware of the treated article exemption, and took extraordinary efforts to ensure compliance with its requirements. Microban® Plastic Additive "B," the antimicrobial used by Lifetime in the manufacture of the subject products, is specifically registered by EPA for use in the manufacture of the types of products distributed by Lifetime, and, in its registration, EPA acknowledged that the purpose of Microban® "B" was to provide a hygienic surface. Lifetime consulted the language of the regulation itself, the preamble to

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9/ 63 Fed. Reg. at 19,257. Despite its assertion that the policy statement is a "clarification" of the existing rule, some of the new elements include: (1) terms such as "antibacterial," "antimicrobial," "germicidal," and "germs," are prohibited from appearing in the product name and on other labeling and advertising materials; (2) claims, *formerly permitted*, that the protection of the article provided by the applied pesticide treatment has an aesthetic benefit (prevention of stains and odor) are prohibited; and (3) a proposal to prohibit the use of the phrase "mildew proof" on paint and a limitation of claims solely to in-can preservation.

the 1988 final rule, and the 1975 rule that preceded it. As noted above, neither the regulation nor the preamble to the 1988 rule prohibits or limits promotional statements regarding the benefits for the article itself of such protection, and no other formal guidance on the exemption with regard to these issues had been published by EPA.

Lifetime also was aware that EPA had taken enforcement actions against manufacturers of treated articles and carefully reviewed the settlements in these cases for additional guidance on acceptable claims. For example, Lifetime reviewed the settlement between EPA and the Minnesota Mining and Manufacturing Company (3M), regarding a treated sponge product. In *3M*, EPA agreed to the use of placards stating "Inhibits Odor-Causing Germs in the Sponge," and "Does not disinfect or kill germs on surfaces."[10/] Moreover, Lifetime Hoan used language that was consistent with language deemed acceptable by EPA in official public documents released as part of the Agency's enforcement action against certain Hasbro plastic toys that were manufactured using Microban® "B."[11/]

On November 19, 1997, and November 26, 1997, EPA Region II officials inspected Lifetime Hoan's Westbury, New York, and Dayton, New Jersey, warehouse facilities, to investigate a possible violation of FIFRA due to the sale of

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10/ *In re Minnesota Mining and Manufacturing Company*, No. 5-FIFRA-97-027, Consent Agreement and Consent Order (EPA Sept. 29, 1997).

11/ In an April 22, 1997 consent order, EPA and Hasbro agreed to corrective advertisements that named the affected toys and that conspicuously stated "Microban Antibacterial Protection Built in to Protect the Toy! Inhibits the Growth of Bacteria!" *In re Hasbro, Inc.*, No. FIFRA 97-H-06, Consent Agreement and Consent Order (EPA Apr. 22, 1997).

cutting boards bearing antimicrobial claims. In Dayton, EPA inspectors obtained a packaged, labeled, cutting board, verbally affirmed, when asked, that no violations were observed, and took no other action.

At the January 1998 Chicago housewares show, Lifetime Hoan discovered for the first time that its conclusions regarding the exemption were incorrect and that EPA believed that Lifetime was distributing unregistered pesticides in violation of section 12(a)(1)(A) of FIFRA.[12/] EPA alleged that the following claims took the affected products out of the exemption, making them pesticides requiring registration:

> "Microban Antibacterial Protection built in to inhibit the growth of bacteria on the product"; "Built-in protection, engineered to last the life of the product"; "This Farberware gadget incorporates built-in Microban antimicrobial protection"; "Microban protection inhibits the growth of bacteria, mold, and mildew on the product."[13/]

Lifetime was compelled to settle the matter quickly so that it could resume shipment of these products. In the Consent Agreement and Consent Order (CACO) that Lifetime Hoan signed, Lifetime agreed to affix stickers to all allegedly violative products before resuming shipments. The stickers contained the following language:

12/ 7 U.S.C. § 136j(a)(1)(A) (1996).

13/ *In re Lifetime Hoan Corp.*, No. FIFRA 98-H-04, Consent Agreement and Consent Order (EPA Feb. 13, 1998).

> Microban antibacterial protection is built in to inhibit the growth of bacteria that may affect the plastic in the product and does not protect users or others against food-borne bacteria. Always clean and wash the product thoroughly before and after each use.[14/]

In the CACO, EPA also dictated the specific size of the sticker, mandated the font size and style, and limited its placement and prominence on the packaging itself.

Lifetime was provided with no notice that its course of conduct and its exercise of commercial speech was anything but in full compliance with the treated article exemption, and had no opportunity to conform its conduct to EPA's hidden, evolving interpretation of the exemption. As in *Hoechst*, Lifetime's deficiency was simply its failure to conform its conduct (*i.e.*, use of specific wording) to a binding, secret, changing Agency position, which continued to develop even as negotiations in its case with EPA proceeded.[15/]

[14/] The origin of this "acceptable" treated article language, and its placement and prominence, was not then and is not now published or known. It is also important to note that, even with the corrective stickers applied, EPA still considers these articles to be illegal unregistered pesticides. While the Agency is allowing the stickered products to be sold, it is EPA's position that the use of the word "antibacterial" in describing the treatment applied to an article violates the exemption.

[15/] In its April 17, 1998, *Federal Register* notice, EPA cites the series of CACO's as public notice of its interpretation. Unfortunately for Lifetime, the CACO it signed did not exist when it developed its product lines. In any event, CACO's coerced from parties desperate to be freed from the extraordinary burden of a SSURO cannot be viewed as legal precedent for additional extra-regulatory requirements.

In the case of the treated articles at issue, there is no imminent danger; EPA Administrator Carol Browner has publicly acknowledged that products manufactured using Microban® "B" pose no safety risk even in a situation where children would have potential intimate and frequent exposure.[16/]

C. EPA's Tactic Illegally Circumvents the APA and Regulatory Review Statutes

The Coalition believes that the heart of the issue in *Hoechst*, use of enforcement proceedings to announce and impose new, inconsistent policies regarding substantive rules, and the undue deference the courts have given to such agency action, are amply illustrated by EPA's recent handling of treated articles. The connection between cause and effect is succinctly made by the following passage describing EPA's pattern of enforcement practices:

> Where an agency can nonlegislatively impose standards and obligations that as a practical matter are mandatory, it eases its work greatly [when following these practices] in several undesirable ways. It escapes the delay and the challenge of allowing public participation in the development of its rule. It probably escapes the toil and the discipline of building a strong rulemaking record. It escapes the discipline of preparing a statement of the basis and purpose justifying the rule. It may also escape APA publication requirements and Office of Management and Budget regulatory review.

16/ U.S. Environmental Protection Agency, Press Release, *EPA Acts to Prevent Playschool Toy Manufacturer Hasbro, Inc., From False Claims About Protecting Children from Microbial Infections* (Apr. 18, 1997).

> And if the agency can show that its informal document is not final or ripe, it will escape immediate judicial review. Indeed, for practical reasons it may escape judicial review altogether . . . One can readily understand how a government instrument so quick, cheap, largely unchecked and low in risk, and yet so effectual, may tempt some agencies to slight the APA's mandates.

Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like--Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1317-18 (1992).

EPA's actions in *Hoechst* and *Lifetime*, and its announced enforcement policy regarding treated articles, illustrate a legally deficient and impermissible vehicle for substantively amending the scope and effect of a published legislative rule. A federal agency cannot attach additional binding obligations to a substantive regulation without adhering to the legislative process mandated by the APA.[17/] The

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17/ EPA's own Environmental Appeals Board (EAB) has recognized the problems that occur when the regulated community is not provided with fair notice. *See CWM Chemical Servs., Inc.*, No. TSCA-PCS-91-0213 (EPA May 15, 1995). In dismissing EPA's complaint on the basis that the Agency failed to provide adequate notice to the regulated community, the court stated

> Basically we are holding the Agency to a standard of notice that requires the Agency to express the intent of its regulations with sufficient clarity that those who may be subject to penalties for violating the regulations have fair warning of conduct prohibited or required by the regulations.

The Coalition believes that this decision, which the EAB specifically applied to all of EPA's regulatory programs, correctly requires EPA to

Coalition believes that EPA's proposed approach also sidesteps compliance with other statutes such as the Paperwork Reduction Act , 44 U.S.C. §§ 3501-3520 (1994) and the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, 111 Stat. 2592, and improperly circumvents the checks and balances within the Executive Branch provided Executive Order 12,866.[18/]

D. EPA's Illegal Use of the Enforcement Process Continues Today

Having coerced several manufacturers into entering into consent agreements, EPA has now publicly announced that it intends to proceed in amending the exemption without rulemaking. According to the April 1998 *Federal Register* notice, EPA will maintain and enforce a policy for treated articles that is extracted from its then recent enforcement proceedings. Significantly, according to the *Federal Register* notice, EPA will bring enforcement actions against products that use the terms *antibacterial, antimicrobial, or germicidal* in product literature unless the term appears only in a specific context that EPA apparently has determined is the only possible

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clarify its substantive interpretations prospectively through legislative rulemaking.

[18/] Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993). Regardless of how they are styled by the Agency, EPA's *Federal Register* and draft PR notices fall squarely within the SBREFA and APA definition of "rule," and the term "regulations or rules" as it is defined under 5 U.S.C. § 551(4) (1994) and Exec. Order No. 12,866 § 3(d). The burden falls on the regulated community to call EPA to task for avoiding its responsibilities to the public.

statement that will not be misleading to consumers.[19] The requirements specified in the *Federal Register* notice constitute requirements that are not at all apparent on the face of the rule (or any other guidance previously published by EPA) and, as in *Hoechst*, these substantive limitations have evolved only in the course of enforcement actions brought on the basis of the silently and secretly amended rule.

This approach offends any reasonable notion of due process, and amounts to a deprivation of the right to commercial free speech.[20] EPA's new enforcement policy is just that — new. Although the Agency insists that the policy is merely the formalization of longstanding and unchanging Agency positions, it plainly is not.

E. Other Federal Agencies Use This Tactic

From time to time, other federal agencies' actions that parallel EPA's evasion of the APA's prescriptions are properly recognized and redressed by federal courts.[21] The Court has

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[19] The Coalition is not aware that EPA is known to have expertise in predicting consumer perceptions.

[20] *See Central Hudson Gas & Electrical Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

[21] Anthony, *supra*, cites many examples of federal agencies using nonlegislative rules to bind the public. Anthony, *supra*, at 1333-39; *San Diego Air Sports Ctr., Inc. v. FAA*, 887 F.2d 966 (9th Cir. 1989) (FAA letter prohibiting parachuting in terminal control area is rule subject to APA rulemaking requirements); *Southern Cal. Aerial Advertisers' Ass'n v. FAA*, 881 F.2d 672 (9th Cir. 1989) (FAA letter closing airspace to fixed-wing aircraft not adopted through APA rulemaking procedures represents change in FAA policy and is invalid); *United States v. Picciotto*, 875 F.2d 345 (D.C. Cir. 1989) (additional U.S. Park Service restrictions on demonstrations and events in park not adopted through

previously recognized the key role of the courts in supervising federal administrative agencies and the varying degrees of deference owed to agency interpretations. In *Martin v. Occupational Safety and Health Review Commission*, Justice Marshall noted that

> [a]lthough not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers . . . informal interpretations are still entitled to some weight on judicial review . . . the decision to use [an enforcement action] as the initial means for announcing a particular

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APA rulemaking procedures invalid); *Jerri's Ceramic Arts, Inc., v. Consumer Prod. Safety Comm'n*, 874 F.2d 205 (4th Cir. 1989) ('interpretive statement' regarding removal of exemption from rule banning small childrens' toys and providing CPSC with power to enforce violations set aside for failure to comply with rulemaking requirements); *Alaska v. Department of Transp.*, 868 F.2d 441 (D.C. Cir. 1989) (FAA orders regarding unfair and deceptive advertising subject to APA rulemaking requirements); *Chamber of Commerce of the United States v. OSHA*, 636 F.2d 464 (D.C. Cir. 1980) (Secretary of Labor 'interpretive rule and general statement of policy' regarding employee pay for accompanying inspectors vacated for failing to comply with APA rulemaking requirements); *Texaco, Inc. v. Federal Power Comm'n*, 412 F.2d 740 (3d. Cir. 1969) (Federal Power Commission order amending regulations under the Natural Gas Act to provide for compound interest rates set aside for lack of adequate notice under the APA); *Prows v. United States Dept. of Justice*, 704 F. Supp. 272 (D.D.C. 1988), *aff'd*, 938 F.2d 274 (D.C. Cir. 1991) (Bureau of Prisons' statement requiring allocation of pay to certain financial obligations illegally promulgated); *United States v. Bioclinical Sys., Inc.*, 666 F. Supp. 82 (D. Md. 1987) (draft FDA inspection guidelines cannot be used to establish enforceable current good manufacturing practices); *Bellarno Int'l Ltd. v. FDA*, 678 F. Supp. 410 (E.D.N.Y. 1988) (FDA's failure to conduct notice-and comment rulemaking procedures prior to issuance of 'import alert' violates the APA).

> interpretation may bear on the adequacy of notice to regulated parties . . . .

499 U.S. 144 (1991) (citations omitted).

Despite the Court's admonition in *Martin*, the U.S. Occupational Safety and Health Administration (OSHA) recently pursued such "non-regulation regulations" and brought enforcement actions based upon new, substantive interpretations, in a case involving OSHA's Hazard Communication Standard (HCS).

In 1983, OSHA adopted language requiring manufacturers of hazardous chemicals to develop "appropriate hazard warnings" to be placed on shipping containers of such products.[22] Nearly three years later, OSHA interpreted this provision in a "Compliance Instruction,"[23] ostensibly a document instructing its inspectors how to apply and enforce the regulation, to require the identification of "target organs" as part of the appropriate hazard warning. The specific regulatory provision did not mention target organs, nor was it clear that manufacturers should look beyond this plain language to determine that something more than what was generally accepted as good practice was required. The Compliance Instruction, in a most circuitous logic, stated that manufacturers should have followed the following path: (1) "health hazards" were defined in the regulation; (2) Appendix A, characterized as a "mandatory" appendix, was referenced in that regulatory definition; (3) manufacturers should have known to look to

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[22] 29 C.F.R. § 1910.1200(f)(1) (1997).

[23] OSHA Compliance Instruction (CPL), *CPL 2-2.38C, Inspection Procedures for the Hazard Communication Standard, 29 C.F.R. 1910.1200, 1915.99, 1917.28, 1918.90, 1926.59, 1928.21* (Oct. 1990).

Appendix A; (4) "target organs" were discussed in Appendix A in one of seven examples of "health hazards"; and (5) manufacturers should have known to further infer that such target organs were a mandatory component of an appropriate hazard warning.

OSHA aggressively enforced its new target organ requirement and cited American Cyanamid Company for failing to include target organs on labels of one of its products. On appeal, the Occupational Safety and Health Review Commission (OSHRC) rejected OSHA's citation on the grounds that it was a "departure from the original policy under the HCS . . . [and] because the departure was inadequately explained."[24/] The Court of Appeals for the Sixth Circuit, in a most extraordinary example of deference to an executive agency, concluded, essentially, that because OSHA's logic could be followed — however convoluted the path to the result — that the agency's interpretation was not unreasonable and the court had no reason or basis to reject it.[25/] *Cyanamid* is now invariably cited by OSHA counsel in administrative adjudicatory proceedings for the proposition that deference is warranted.

F. By Giving Undue Deference to Agency Enforcement Interpretations, Courts Are Promoting an Illegal Practice

As pointed out by petitioner, because courts have misinterpreted and misapplied the standard set forth by this Court in non-enforcement cases such as *Chevron, U.S.A., Inc.*

24/ *Secretary of Labor v. American Cyanamid Co.*, No. 86-681, 1992 WL 30659 at *1 (OSHRC Feb. 7, 1992).

25/ *Martin v. American Cyanamid Co.*, 5 F.3d 140 (6th Cir. 1993).

v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) and its predecessor cases, *Udall v. Tallman*, 380 U.S. 1 (1965), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945),[26] agencies continue to act illegally knowing that even if their actions are challenged, a reviewing court will likely "rubber stamp" the agency action unless it is clearly ridiculous. *See, e.g., Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 411 (7th Cir. 1987) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (courts will defer to agency interpretations in all but extraordinary cases)). Knowing that reviewing courts will grant virtually unbridled deference, EPA and other federal agencies are encouraged to become more aggressive in their actions.

It appears from *Hoechst*, recent enforcement cases involving treated articles, and from the cases cited above, that this Court should accept this case for review to reemphasize the important role of the judiciary in supervising the administrative process.

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[26] Other commentators have characterized the practice of ambiguous interpretation by agencies as unfair and inappropriate. A recent Working Paper published by the Washington Legal Foundation identified the problem as one based on an incorrect presumption. Chadd and Bowman argue that whatever deference is warranted to agencies' expertise in rulemaking is not justified when enforcement is the context, and challenge the rationale in *Bowles* that "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." 325 U.S. at 414. The authors argue that the result is patently unfair, giving administrative agencies license to adopt vague regulations and to interpret them capriciously to suit their immediate needs. Charles M. Chadd & Jerome K. Bowman, *Agencies' Enforcement of Ambiguous Regulations Don't Deserve Judicial Deference* (Washington Legal Found., Critical Legal Studies, Working Papers Series No. 84, 1988).

CONCLUSION

For the foregoing reasons, amicus respectfully submits that the petition for a writ of certiorari should be granted.

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